

MR. STORY: Your Honor pardon me just a moment. So far as the Utah Power & Light Company is concerned-- that of course is the object of the discussion I presume-- the only controversy there ever is so far as their rights are concerned is between the Provo Reservoir Company and itself. In other words, those are the two rights between which the water flowing in the river must be divided. We do no conflict with any other users. Now, it does not take any more time, I take it, to regulate that particular headgate than it does the headgate of any other ditch upon the stream, and particularly the ditches where they do conflict with many other rights. We feel that we have been paying-- I say it in all frankness-- more than our just share. On the other hand we have been ready to pay it.

THE COURT: Is this the amount you have been paying, one hundred and eighty dollars a year?

MR. STORY: Yes, we are willing to continue but don't want to have it increased. We do not think it would be at all fair to increase it.

MR. RICHARDS: . It has been suggested by way of comparison Provo City is paying fifty-two dollars a month for its service as against fifteen on the part of the company. My clients suggest a disproportion there.

MR. STORY: Yes, but they conflict with vastly more rights than we do. That is why they have to have much more regulation than we do.

THE COURT: With the information I have before me-- I understand the Power Company objects to it being done that way-- with the information I have before me, I will have to say I have no basis on which I can make any change. I do not know anything about the situation.

MR. MCDONALD: Your Honor please, I was going to suggest-- in fact I did not know an opportunity would be given at this hearing for this.

THE COURT: This is a matter, gentlemen, I think comes in connection with and should come in connection with, the appointment of the commissioner. The court will appoint a commissioner at either this session or immediately after it at a session for that purpose, and at that time the compensation of the commissioner, and the method of raising it and expense of the commissioner, of course, will come up all together.

MR. MCDONALD: That is what I have advised the people of Wasatch County. They were prepared to come here and make a showing, but did not think they would be listened to at this time, and for that reason have not presented it at this time.

THE COURT: I will make no change in this at this time. However, I think if this is carried into the decree it should be carried into it in different language. I suppose it is, and it should be, until the further order of the court. It should not be a positive statement like this is, fixing the amount without change.

MR. BOOTH: Section 130, at page 75.

MR. STORY: You mean, shall be as follows until the further order of the court?

THE COURT: Yes. When this matter comes up in connection with the appointment of the commissioner it shall be open at that time to be fixed.

MR. MCDONALD: I would like to inquire at this time the pleasure of the court relative to hearing an item which is one of itself. The Midway Irrigation Company and

Wilford Van Wagonen are asking the court to amend a certain paragraph of the language of the decree for the reason they are not parties at all to the Provo River system; certain of their waters do not reach the river and I understand Mr. Wentz does not give them any service, and they are charged up with regulation of the system, and they have filed motion and served a notice. If you Honor cared to take it up I could call attention to it now; or it could be done at the time.

THE COURT: It is merely with reference to the proportion of this expense heretofore charged to them?

MR. MCDONALD: Yes.

THE COURT: I would prefer to take it up at the time we take up the matter of the appointment of the commissioner, if we can dispose of these other matters first and get them out of the way.

MR. HATCH: If the court will permit a suggestion, in preparing the decree, the court put in such changes in this section as it shall determine will be right for the current season.

MR. MORGAN: May it please the court, calling attention to the decree, paragraph 131, providing for a commissioner to distribute the waters in the most economical way to prevent waste, and it shall appear that combining the flow of a number of parties and giving each of them an equivalent quantity with a proper sized irrigating stream for a period of time at reasonable intervals commonly called the rotation system, thereby effecting a saving of water, and at the same time meeting the full necessities of the users, that the commissioner may do so, and any party may at any time petition the court to modify or change the method of distribution of the quantity of water herein

awarded upon written application to the court. Now, the Upper East Union Irrigation Company has filed a motion to have the court provide for a distribution by the rotation system, so far as their canal is concerned. It seems the Faucett Field people take water through that canal, and a certain amount of water is awarded to the Faucett Field Ditch Company, and a certain amount of water is awarded to the Upper East Union Irrigation Company. I would like to inquire whether the court at this hearing or adjourned hearing, will take up matters of that kind?

THE COURT: Do you represent all these parties?

MR. MORGAN: I represent the Upper East Union, and I understand there are some objections. The decree provides oral or written testimony may be offered. We will prefer to offer oral testimony.

THE COURT: I hardly think we will have time to take it up this hearing.

MR. MORGAN: We are not anxious about it now, but like to know whether the court would hear that matter now. We think now is the proper time to hear it. The parties are all before the court and the presiding judge of the court is not familiar with the facts, and we believe it will be much more economical to distribute this water on the rotation system rather than distribute it by the cubic feet per second, as decreed by the findings and decrees.

MR. HATCH: That I take it would be left to the Commissioner to do so without an order of the court.

MR. MORGAN: Yes, it is left to the commissioner, but the decree provides the parties may ask that the court do it now.

MR. EVANS: Will it involve the taking of evidence?

MR. MORGAN: It would if there was objection.

MR. RAY: The Faucett Field would object to it.

MR. HATCH: I would suggest we dispose of this decree as it is, and then take that up as provided in the decree as a separate matter. It is prolonging this matter until probably we will never get a decree, and we are anxious to have the original case disposed of at some time, and under this section or paragraph that is a matter that can be taken up at any time on application to the court, and I think we ought not to delay the closing of this case.

THE COURT: I think we can take it up at the time the other matter comes before the court.

MR. STORY: Your Honor, would you permit me to make some objections at this time? They won't take me a great while, and I cannot be here Monday.

THE COURT: You are next on the list.

MR. STORY: Section 82 of the findings, on page 84-- the first question, or first objection we make really relates to the question of irrigation season. That we have already discussed somewhat. The specific objection is that the paragraph does not fix the period during which the water therein mentioned may be diverted and used by the said appropriator. That is relating to the John D. Dixon right. And this defendant further objects to the said appropriator being granted the right to use water during a longer period than that during which the same was used for irrigation purposes at the original point of diversion, to-wit, between the 15th day of April and the 15th day of September of each year; and this defendant suggests that the sub-paragraph be modified so as to restrict the use of the water to the said irrigation period. Of course, if the irrigation period is fixed governing all the rights covered by the decree, it would

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automatically cover that one too. There is just this specific difference between this and the other rights, namely that this is one of the rights which has been transferred down the river. Of course, it was used for irrigation purposes at the old point of diversion during certain definite periods of time, we will say between April 15th and September 15th, and after that the water was permitted to flow down the river and used by the Power Company. Now, having changed it down the river, certainly would object to having the period of use enlarged to our detriment. However, as I say, if the irrigation period is fixed, as I certainly think it should be, governing all the irrigation rights under the decree, then it would automatically take care of that.

MR. RAY: Whenever the question of fixing irrigation season is open, I want to be heard.

MR. STORY: So if your honor will permit me to pass that a moment, I will take up one or two others. In sub-paragraph "b" of Section 87, which is the section relating to the Utah Power & Light Company's rights, the period during which the water may be used is not fixed.

THE COURT: That is the Lost Creek water?

MR. STORY: Lost Creek and Bridal Veil Falls. Of course, they have used that water throughout the year, same as from the river. I think it should be made co-extensive with the annual period January 1st to December 31st.

THE COURT: Any objection to that amendment?

MR. STORY: Page 46, sub-paragraph "b", section 87, that is certainly in conformity with the testimony, your honor.

THE COURT: Do I hear any objection?

MR. HATCH: We have no objection.

THE COURT: The amendment may be made. I have

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interlined it.

MR. STORY: Now, your honor, the next objection I wish to make is a very small one, relates to the limitation placed upon the power rights, section 87 of the findings, section 33 of the decree. The section at the present time uses the word "substantially" and "substantial". In other words must be so used as not to substantially interfere with the natural flow of such water, and thus cause substantial fluctuation in the flow thereof. Now, I take it the word "substantial" when used in that connection means to any large amount. Obviously you cannot avoid substantial fluctuation when you turn the water out of your flume and turn it back in again. It seems to me that the question is whether or not we unreasonably interfere. The word "unreasonably" has quite a well defined legal meaning in matters of that kind. I may not so use my rights as to unreasonably interfere with the rights of another appropriator, and it seems to me it should be changed so as to use the word "unreasonably".

MR. EVANS: Why not strike out the word "substantially" and let it read "so as not to interfere".

MR. STORY: I may interfere to a certain extent, it cannot be helped, the use by one appropriator naturally interferes with another. The question is does he reasonably interfere.

MR. RICHARDS: On behalf of the City we shall have to object to the change, and call attention to the Chidester decree which awards the water as follows: "That the Telluride Power Company has no right to impound the waters of Provo River so as to interfere"-- not unreasonably interfere, or substantially interfere, but so as to interfere with the natural flow thereof-- etc. (Reading)

MR. STORY: Injuriouly I suppose contemplates unreasonably.

THE COURT: I don't know if there was any evidence on that subject in this case. There has been quite a lot in other cases, that it is possibly to operate a power plant without substantial fluctuation.

MR. RAY: There was a lot of evidence taken in this case.

THE COURT: There has been evidence that it is possible to operate then without fluctuation, and I understand the law to be their rights are subject to that limitation, they must not operate them<sup>so</sup> to as make a substantial fluctuation which will interfere with the use of the water by other users.

MR. RAY: You will remember in the trial of this case we introduced evidence relative to the intake of the Timpanogos and Provo Bench, control of the gate and forebays things of that sort, for the purpose of preventing the fluctuation caused by the shutting off of the water, and Mr. Wentz was sworn as a witness.

MR. HATCH: Considerable evidence taken on that point, and the question of substantial was, as I understand it, used.

MR. RICHARDS: Our idea, this decree having been in force for fourteen years last month, the Chidester decree, there isn't really any proof in this case, or fact presented, reason or justification for changing it, and simply shifting to another basis which may go from one of fact to one of law, whether it is reasonable or unreasonable. It is inviting complications. As far as the city is concerned, we would prefer to avoid it.

MR. EVANS: I think this decree was introduced in evidence, and in this decree is a stipulation between the

Telluride Power Company and City which prevents them from interfering with the fluctuation of the water there, so that there is evidence in the record upon which to base the word "substantially".

MR. STORY: I do not think there is any very great difference between us. I do not think the Power Company has the right to unreasonably interfere with another man's right. The only question is, can we express it more accurately with one word than the other. I feel we express it more accurately with the word "unreasonably".

MR. HATCH: Of course, we insist the word "substantially" is definite and certain, and word "unreasonably" leaves it open.

THE COURT: The word "substantially" is the term usually used in reference to power rights, so far as my experience has gone. I think it may remain in.

MR. STORY: And that will carry with it the denial of the sixth objection to the findings and decree.

Now to sub-paragraphs "a" and "b" of Section 88. That raises the same question that is raised in the first objection to the Dixon right, in other words, the time during which the water may be used by the Provo Reservoir Company.

MR. RICHARDS: That was amended I thought.

MR. STORY: May have been amended, but not in this particular. At the time we have this section 88 under consideration, I did not know your honor desired to take up other objections to the same section, but the question of irrigation season enters into that and raises the same question as the first objection, so for the time being, I will pass that.

MR. HATCH: Not as to time .

MR. STORY: Yes. However, if the irrigation season is fixed by this decree, then of course it will automatically cover that point, same as the Dixon right, but we certainly object to you taking the water at the headgate and enlarging the period of use, and we think it should be definitely fixed.

If I may go on to the next and last objection, your honor, except those that are involved in the irrigation period, we object to Sections 92 to 98, inclusive, and Section 100 of the findings, and sections 38 to 44, inclusive, and section 46 of the decree.

MR. HATCH: Give us the page.

MR. STORY: These are the sections relating to an adjudication of rights based upon applications filed in the office of the State Engineer, which have not as yet reached the point where a Certificate of Appropriation has been issued by the State Engineer. In other words, these particular paragraphs merely hooked an inchoate right, and we object to the wording of the sections as they are drawn.

MR. EVANS: Have you any suggestion how they should be worded?

MR. STORY: Yes sir, just a moment. My suggestions are as follows: Object to them in so far as the same find and adjudicate that the several appropriators named in said paragraphs are entitled to complete the appropriations therein mentioned, and to make final proof thereof, and as to what the rights of the said applicants shall be, if and when the said appropriations shall be completed, and suggests that each of said sections as now drawn be changed by striking the following words at the end of the first paragraph thereof, viz.: "and is entitled to complete said appropriation and make final proof thereof", and by striking from the second paragraph thereof the following word, viz.:

"from year to year and time to time under"; and substituting therefor the following: "during the period of each year covered by." And by striking all the last paragraph thereof, and substituting in lieu thereof the following:

"Provided, however, that the priority and amount of this appropriation is conditioned upon compliance with the terms of the application upon which said appropriation is based, to-wit, application No. \_\_\_\_\_ filed in the office of the State Engineer of Utah, and the same is subject to the provisions of the laws of the State of Utah governing the issuance of certificates of completion of appropriation by said State Engineer."

In other words, I take it this court does not intend at this time to adjudicate anything more at the very most than what the present status of that inchoate right may be, and I wish to avoid, if possible, in this decree anything which by any possibility may hereafter be taken as an adjudication of anything that is to be done in the future, because some very important rights as between the parties to this litigation may hinge upon a decree of that kind, so that we suggest each of said sections as now drawn be changed as suggested.

Now, that does give them, if the language is used I have suggested, it gives them an adjudication at a certain time they have this right, but it does not in any way adjudicate anything in futuro, and lets it be very definitely understood there is no intention in this decree to adjudicate anything, the rights of the parties with reference to ~~a matter~~ making final proof in the office of the State Engineer, or anything which would be binding upon the State Engineer in his final determination.

THE COURT: The view the court has, this court has no right to go beyond the mere fact of determining the priorities

of these various applications; in the event they proceed and perfect their right by complying with the laws of application, and merely find the laws have been complied with up to this time. If it is intended to do anything beyond that the court should not do it.

MR. STORY: I am afraid the language used in the findings and decree as now drawn would have a different construction, because they certainly relate and cover acts in futuro.

MR. HATCH: The way I read this is they may from time to time as they have complied with this use the water under these applications; that they have made applications that were in good standing at the time of the hearing, and by complying with the law, they are entitled to the use of the water.

THE COURT: That is unquestionably their right, and, as far as they have complied, they are in a certain class, and I think that the division should be left there. Now, in order to make it plain, it might be that your suggestion on page 3 of your suggestions, that language might follow in these several paragraphs, 93, 92, whatever they are, referring to the various applications set forth in these paragraphs, with this proviso: Providing, however, that the priority and amount of this appropriation is conditioned on compliance with the law.

MR. STORY: That covers it, I don't know the other is material.

THE COURT: I think you are entitled to have that in there to make it plain. What objection have you to that, Judge Hatch?

MR. HATCH: I do not think that it can affect us in any way.

THE COURT: It makes it plain the court does not intend to make any decree --

MR. HATCH: Paragraph 92, first part of it, I think ought to stand.

THE COURT: I am suggesting they all stand just as they have been prepared by the committee, but adding in each paragraph this modification, this proviso, to make it plain the court is not intending to determine the question of the rights that may be insisted upon in the State Engineer's office, matter for him to determine.

MR. STORY: I think that covers it.

THE COURT: Then that proviso may be inserted after each of the paragraphs 92 to 98 in the findings and 38 to 44 in the decree, and also section 46 of the decree.

MR. STORY: Now, your honor, just a word with reference to the other question, namely, the irrigation season. We are affected by that only in so far as those rights which have been transferred down the river are concerned, I think. Nevertheless, it does seem to me that a definite irrigation season should be fixed by the court, and if so, as I have said before, it will include these objections which I have made. Now, I have heard some time in the past, I remember, that beneficial use is the measure and limit of an appropriation, and some cases ~~xx~~ decided in support of that proposition, and this court is engaged in awarding the right which has been perfected in that manner, and supposed to have been based on the evidence introduced in the case in support of such appropriation. Now your finding must, of course, conform to the evidence introduced. Unless I am very much mistaken, there has been absolutely no evidence introduced in this case of any irrigation right being used prior to the 15th of April, or subsequent to the 1st of November, each year. So

far as we are concerned, the particular days don't make any great deal of difference, but certainly in order to conform to the evidence, the decree cannot go beyond the time that the evidence shows the water has been used in order to perfect an appropriation; and that it seems to me, your honor, is the reason why you should fix the period, and if you do not then, of course, all reference to irrigation season in the decree would have to be eliminated, but the way the decree at the present time reads, as I interpret it, between the 10th day of September and 10th day ~~XXXXXXXX~~---whatever the date is -- of the following May, there is an irrigation right fixed of so many acres duty, of so many acres per second, and there is no evidence to sustain an irrigation use during that period. There may be some evidence to sustain a claim for domestic use between certain periods, but certainly domestic use would be different from irrigation use, and the measure of the right would also be different under the authorities. We are particularly interested, however, only in those particular rights which have been transferred down stream and past our headgate, and we feel we are seriously injured if those rights-- Provo Reservoir Company is now permitted to use those rights for a longer period of time than they were formerly used at the original point of diversion. I thank your honor.

MR. RAY: May it please your honor, personally I don't see any reason for specifying any season for the irrigation season. I think that grows out of the past when the court did not appoint commissioners and keep supervision of the water rights. Water rights are based on beneficial use, but an irrigation season is not, and as long as your honor appoints a commissioner who says at no time can water be turned that shall not be beneficially used when turned, there ought not to be any particular irrigation season. Some years they have to irrigate in October and November, and in the spring they have to irrigate to plow. That is

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a beneficial use, a recognized use. If the waters are solely in charge of the commissioners, turning of them, there ought not to be any irrigation season. There ought not to be any winter use to interfere with anybody, because there cannot be any irrigation in the winter. When the right is referred to as an irrigation right, it will take care of itself, and when we refer to the irrigation season, it means any season when the water is used for irrigation.

THE COURT: Then you would be in favor of eliminating entirely the expression "irrigation season"?

MR. RAY: No, I would use the word "irrigation season", and as used it would mean any period during the year when the water is applied to the land. Mr. Story refers to the fact they have introduced evidence of a beneficial use during a certain period, but the period has not been the same, and the court strikes the evidence.

(ARGUMENT)

THE COURT: I am inclined to think there would be difficulty unless the court incorporated a definition of irrigation season in the decree. If a definition such as you have suggested were incorporated, there would not be any difficulty, but otherwise than that, it would be a matter of difficulty.

MR. RAY: The commissioner would have just such instructions as I have suggested there in the decree, or some other.

MR. HATCH: If the court please, the season varies from year to year and from place to place. Now, I have, signed with the Wasatch Irrigation Company, ~~sent~~ a letter, it is an agreement whereby they claim the right to the use of the water up to the 15th of November, and they take care of the water flowing in their canal up to that time. If I want to

use it thereafter, I become responsible for the canal, and any damages that may accrue from overflowing, freezing, and that sort of thing, and assume the control of the ditch from the 15th of November until such time in the spring as they again want to divert and use the right. The time in the spring varies say from April 1st up to May 10th, when water can be put into that canal in some seasons. Other seasons it might be used the entire year, but they use it in Wasatch County for irrigating the land to plow it every season until they become frozen to such a depth they can no longer plow.

THE COURT: Gentlemen, I think probably we have gone as late as we can today, because some of the parties want to catch the car that passes through here about six o'clock.

(Discussion as to time of meeting.)

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 5:30 P.M., RECESS TO 10:00 A.M., FEBRUARY 21, 1921.  
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THE COURT: I think we had proceeded with these matters down to the proposals of Mr. Brockbank, I. E. Brockbank representing Park, Cutler and McBride.

MR. BROCKBANK: Your honor, there are three motions there that may be considered on the same basis, that of David S. Park, Daniel B. McBride and M. B. Cutler. The purpose of that motion is to change the acreage in each of the respective defendants varying from 2.49 to 2.67 acres. I might state the theory of that motion is as follows: The defendants represented to me that at the time testimony was taken in this matter there was one set of facts carried to its logical conclusion, and that is in regard to the property of Brice McBride, in which case, as I understand it, the increase in acreage was allowed, and the attorneys, Mr. Sanford and Mr. Booth, who represented these parties, informed the defendants

that the decree would also allow their increased acreage, as they gave testimony to support. We find it has not done so, as in the case of Mr. McBride.

THE COURT: What was your pleading in reference to their acreage?

MR. BROCKBANK: It was considerably more than the change. The sharp conflict of testimony in that matter was in the testimony of Mr. Scott Stewart and Mr. John Stewart. One fixed the acreage at 12.30 and the other at 14.60, and that testimony is given in the case of Mr. Park in the transcript page 2585.

THE COURT: It is an error, is it?

MR. BROCKBANK: They represented to us it is merely an oversight in not having their acreage increased.

MR. EVANS: As I understand that, that was a matter that was contested. It was submitted on both sides, and the court found as the decree now provides.

MR. HATCH: Who are the parties he asks to change the acreage?

THE COURT: David S. Park, Daniel B. McBride and M. B. Cutler.

MR. EVANS: Where is that?

MR. BROCKBANK: It is up in the river bottoms.

MR. EVANS: There is a sharp conflict of evidence in regard to the acreage up there, the land was partially covered with trees and brush, and my recollection of the evidence is that Mr. Stewart actually made a survey of that land.

MR. HATCH: Both Stewarts.

MR. EVANS: And the court made a finding.

THE COURT: I know there were some instances of that kind. I do not recall the names of the parties, but I remember of going over the evidence of those people, Mr. Stewart and the other Mr. Stewart.

MR. BROCKBANK: As I looked over the transcript, that case was fought out in the case of Mr. McBride and his acreage allowed, and the defendants informed me as they were in the same class, their acreage would also be allowed.

MR. EVANS: This acreage that is given you under the decree is in accordance with the tentative finding of the court.

MR. BRICKBANK: I am informed this evidence was introduced after the tentative decree was issued. It only makes a difference in each case, I think, of about two acres.

MR. EVANS: I see no reason why we should consent to more acreage now than the court found.

MR. BROCKBANK: The theory was, as they explained to me, in the case of Brice McBride, the discussion was continued to its final conclusion, and his acreage was allowed on the very same testimony and facts as these people who are denied. The very same testimony went before the court in each case, and the acreage was allowed because it was fought out, and in as much as they were in the same class, the time of the court was not taken by fighting for the other acreage. That is the theory they present to me, being substituted for Mr. Booth and Mr. Sanford.

THE COURT: During the noon recess, I will attempt to make some investigation what that situation was. If this is purely an error, and decision subsequent to the tentative decision should have included these parties, of course, then it should be done. If, however, it did not, it is too late now, of course, to correct it.

MR. BROCKBANK: I recognize that point.

MR. EVANS: I might suggest this while on that point, each of those owners up there in the river bottoms stood on their own evidence, they had their own separate tracts and evidence taken as to their individual tracts. I cannot see how the evidence increasing the acreage of one would affect the evidence as to the others.

THE COURT: I will see if I can find anything on it. Mr. Brockbank, you have another matter, the Charleston Irrigation Company.

MR. BROCKBANK: Yes, I have a motion there in behalf of the Charleston Irrigation Company. The purpose of that motion is merely to make the decree conform to the findings, and especially set out in the stipulation, which is known as the Heber stipulation, as amended, and found on page 61 of the findings. As I have looked over the decree, I find no provision made that the Charleston Irrigation Company through its upper canal shall be entitled to a duty of one second foot of water measured at the land from July 5th to September 15th of each year; and that motion merely provides a paragraph in the decree setting forth that right.

THE COURT: Any objection to this, gentlemen?

MR. HATCH: It seems to conform to the stipulation as amended.

THE COURT: The exact language, as near as I can read it. This may be allowed, this amendment, both as to the findings and decree. That was all you had?

MR. BROCKBANK: That is all, your honor.

THE COURT: Mr. Soule, with reference to the Washington Irrigation Company.

MR. SOULE: If the court please, I have two motions here. The first motion I filed was a matter that Mr. Wentz called my attention to, that in the court's decision my clients had been allowed water rights in the first class and 17th class, and in the 1st class water rights they have been allowed what should have been 11th class water, and I have been given more in the decision in the 1st class water than I was entitled to, a small portion of my first class water should be reduced to 11th class, and I believe he is correct in that, and we have re-written pages 63, 64, 65, 66 and 67 of the findings, in which he segregates the 1st class and 11th class. It is the same amount of water, the only change is reduces part of it to 11th class.

MR. HATCH: There is another change, I understand. Under the Fulton decree certain lands of Mr. Soule's clients were awarded 60 acre duty, and other lands a 70 acre duty?

MR. SOULE: That is how the 11th class comes in.

MR. HATCH: As I understand these proposed amendments, by the re-writing of the five pages, corrects those matters, and I have signed the motion with Mr. Soule to adopt these five pages as an amendment to conform to what the facts were.

THE COURT: Are there any parties who object to this?

MR. McDONALD: I suggest it is something new to me, I have not heard about it before, and I don't know how it may affect the parties I represent in Wasatch County.

THE COURT: Affect them beneficially.

MR. HATCH: Puts them in the 11th class and conforms to the stipulation.

MR. McDONALD: If it conforms to the stipulation, we

have no objection.

THE COURT: Then this may be allowed, and if upon investigation, you want to suggest something to the court later, you may do so.

MR. SOULE: I have another motion, I will pass to subdivision 3 of it first. I ask that the water right which appears in the name of Mary A. White, as administratrix of the estate of Thomas H. White, deceased, be changed to read Mary A. White and A. S. Carlyle, as successors to Mary A. White, administratrix. It makes no change in the water, but gives him part of the water. He has purchased in this estate.

THE COURT: You represent Mary A. White?

MR. SOULE: Yes.

THE COURT: I see no objection to that being allowed.

MR. SOULE: Now, in subdivision 4 of the motion, I ask to amend the pleading increasing the acreage in Ola W. Larsen's claim from 60 to 90 acres. The decision gives Ola W. Larsen 90 acres, and the findings gives him 90 acres, the error is in the pleading.

THE COURT: Any objection to the amendment of this pleading?

MR. HATCH: Yes, we do. My understanding is that 60 acres is all the land that is irrigated by that man Larsen in both of his rights, Webb Creek and the river also, and I do not understand that the evidence shows that he is entitled to the 90 acres.

THE COURT: What did the decision give?

MR. SOULE: Gives him 90 acres.

THE COURT: Now, check that decision very carefully

with the evidence. The evidence was put in as a written list and testified to in bulk, but that list segregated the land and gave all the acreage of each one of those parties represented by Mr. Thomas and Mr. Soule, and that was followed and checked very carefully. It may be there was an error in that list, as it was testified to.

MR. HATCH: As to that, if the court please, Ola, W. Larsen, as I understand the matter, is a successor to divers parties there, and by reason of being successor he is not named in the Fulton decree at all, is he?

MR. SOULE: I do not think he is.

MR. HATCH: He is successor. As to that successorship, I don't know whether Larsen himself testified or not, but if you remember, there was testimony as to certain elements of that matter at the time. They were offered and read by Mr. Thomas, as being a statement, and I have forgotten just what the court said at the time, but it was not settled. As I understand it, he was to show his connections as to certain other parties.

THE COURT: You mean the matter of succession and transfers?

MR. HATCH: Yes, others were not questioned.

MR. SOULE: This is just successor of Joseph Ketchum, just the one right, that is the way I think the decision reads.

MR. HATCH: In tracing his rights back to the Fulton decree as successor to the parties 60 acres is all that he was entitled to, and 60 acres is all that they asked for, and, as I understand it, 60 acres was all that he is entitled to or ever has used, or succeeded to, as a prior right.

THE COURT: From whom did he get the land?

MR. SOULE: From Joseph Ketchum.

THE COURT: Was Ketchum one of the parties to the suit?

MR. SOULE: Yes, but I get my information from Mr. Wentz and Mr. Knight, that this was purely an error, he had 90 acres.

MR. HATCH: He has two or three hundred acres of land, but not irrigated. It mentions something, if I am not mistaken, as to rights from Provo River and Webb Creek.

THE COURT: Mr. Wentz, as I understood it, prepared this draft we are considering now. Possibly he can tell us, refer us to where the matter can be straightened out. Can you give us some information about it?

MR. WENTZ: Ola W. Larsen was the successor of Joseph Ketchum. Joseph Ketchum was a party in the Fulton decree and he was awarded 90 acres in the Fulton decree as a first class right. In the pleading in this case, he asked for 60 acres, but in the exhibit, 168, entered in the case, it states 90 acres first class right, and the decision gives 90 acres. In making up the proposed decision, we changed that to 60, according to the pleading.

THE COURT: In my decision I gave him 90?

MR. WENTZ: Yes sir.

THE COURT: That was in accordance with the exhibit introduced as a list of all these matters. You say that the Fulton decree awarded Mr. Kethum 90 acres?

MR. WENTZ: Yes.

THE COURT: Did you understand it that way?

MR. HATCH: No, I didn't check it up personally. I understood the Fulton decree only awarded Ketchum 60 acres. May I ask Mr. Wentz if this Ola W. Larsen is not also awarded

water of Webb Creek in another place.

THE COURT: Under those circumstances, I think they should be permitted to amend his pleadings.

MR. HATCH: We do not object to the amendment to conform to the proof, if he is entitled to it.

THE COURT: I understand. Your position is that under the Fulton decree he would not be entitled to it?

MR. HATCH: He is given in the findings 60 acres 1st class and 38 acres 5th class. I understand you are asking for 90 acres. How was it in the decision?

MR. SOULE: 90 acres 1st class, 38 acres 5th class.

MR. HATCH: How is it in the five pages corrected?

MR. SOULE: The same way, he is in the 1st, 5th, 11th and 17th classes, page 65.

MR. HATCH: Is that the way you ask for it?

MR. SOULE: Yes, I ask the pleading be corrected to 90 acres. I did not know he had that much land. It may be the pleadings should be corrected to include the 38 as well as the 90.

MR. HATCH: Mr. Wentz, were there any changes in the proposed amendments offered by Mr. Soule and myself after I signed it?

MR. WENTZ: Yes, the copy you and Mr. Soule signed, or that you signed, was correcting the 1st and 11th classes as they are in the proposed decision, and the copy that was filed for Mr. Soule made the corrections to correspond to his other motion in the pleadings, increasing Larsen 60 to 90, including the other four names, amounting to about four acres.

MR. HATCH: There is 98 acres in the findings to which

he is entitled, 60 of first class, and balance put in the 5th class.

MR. WENTZ: My copy of the Fulton decree does not correspond with the copy you read here, and I have just sent for it.

MR. HATCH: I did not read from this at all. Did your honor read from the Fulton decree?

THE COURT: No, I have no copy before me.

MR. SOULE: I would like, if the court please, to take a little time to look into the details of that. I think we can save time.

THE COURT: We will pass on to something else, and refer back to this. Mr. Chase Hatch?

MR. SOULE: Just a minute, your Honor. I am not through. I have a correction in the spelling of Hattie J. Prescott to Hettie. I ask also on page 66 of the proposed findings, under the heading of "bc" to modify them. There is an error there. Ernest J. Prescott should have .25 second feet for 15 acres of land.

Now, paragraph 5, Mr. Wentz and Mr. Knight, the water-masters, tell me an error there. This man has 15 acres instead of 10. I have pled 10 and the decision is 10. They advise me it should have been 15 acres. I ask to amend the pleading to make it 15. That is "bc" page 66 of the findings. This man has 15 acres, and they are distributing water to him.

MR. EVANS: Does it show in the Fulton decree?

MR. SOULE: I think so. Is it, Mr. Knight?

MR. KNIGHT: This ground is not in the Fulton decree.

MR. HATCH: Was there any proof offered?

MR. WENTZ: The exhibit shows 15.

MR. SOULE: The exhibit offered in evidence shows 15 acres?

MR. WENTZ: Yes.

THE COURT: Does the decision show 15?

MR. SOULE: The decision shows 10. I did not offer the evidence and for that reason, I am not very familiar with it.

MR. EVANS: On what theory do you ask that?

MR. SOULE: That he has got the land and always been recognized as being 15 acres. The proof shows 15 acres, but the decision shows 10.

MR. EVANS: If that is the fact, it ought to be 15.

THE COURT: While it does not seem large, yet it is quite important to a man with only 15 acres to have 33 per cent left out.

MR. EVANS: I am informed by Mr. Tanner the proof showed 15 acres, and the original decision showed 15, but this was made up on the pleadings. If that is so, he is entitled to the amendment.

THE COURT: Under those circumstances this amendment will be allowed.

MR. EVANS: And the finding will be changed to 15?

THE COURT: Yes.

MR. SOULE: The next is paragraph 6. I ask simply a change in name again. At the bottom of page 66, William

L. Prescott, insert in lieu thereof Emily Prescott and Martha E. McNeil successor to Isaac Hunter, successor to William Prescott. That is page 66, "bd".

THE COURT: You represent William L. Prescott?

MR. SOULE: Yes.

THE COURT: It may be allowed, if they have become successors to this property.

MR. SOULE: Instead of allowing this motion, we will add William Prescott down to "ar".

THE COURT: Martha E. McNeil, successor to Charles Murphy. Then your successive paragraphs of your motion, you withdraw?

MR. SOULE: Yes.

THE COURT: And the change on page 66 I have made by interlineation on this exhibit here is to include William Prescott.

MR. SOULE: I believe we passed on this next one, Hettie Prescott, and passed on the one as to 15 acres for Prescott. Now, 9 insert preceding Mary A. White, the word "A. S. Carlyle", That is on page 63.

THE COURT: In "r" on 63, is that the one, A. S. Carlye, successor to Mary A. White?

MR. SOULE: Simply want to precede the words "Mary A. White" with A. S. Carlye as successor.

THE COURT: That is the way it is in the one I have here.

MR. SOULE: That is in the correction offered.

THE COURT: Yes, and I understood that correction was

adopted except the matter later discovered and waiting for you to make some investigation.

MR. SOULE: That is all of that class of corrections. In the second division, however, of my motion they call my attention to another matter in the decision, or in the decree, at page 39 under "bk"; that same right appears as "bn" at page 67 of the findings. That is her individual right, not the right as administratrix, and the words "as administratrix of the estate of Thomas White", should be stricken out to make it conform with the findings; the findings are correct, just Mary A. White.

THE COURT: The words "as administratrix of the estate of Thomas A. White, deceased" may be stricken out in the decree.

MR. SOULE: Now, your honor please, in subdivision 2 of my motion I find that Mr. Knight and Mr. Wentz report to me there are four water users at Kamas who were not made parties to this suit, total of eight acres; Mr. Parley Gines, 5 acres; Rosel Leffler, 3/4 acres; George R. Hardman, Jr., acre and a quarter, and John T. Moon, one acre. It does not increase the claims in the Fulton decree. They have never been summoned, never been in the case, but have those water rights, and been distributing water to them. I thought it was such a small amount, they are willing to come in and have their rights adjudicated, it would be better to allow them this water right than close up the case with parties outside of the suit.

THE COURT: Do you represent them and ask to be included?

MR. SOULE: Yes, I represent them, and ask they be made parties and awarded water, as Mr. Wentz has figured it out.

MR. HATCH: Who do they succeed?

MR. SOULE: One succeeds G. O. Ellis, another successor of Mary Ann Moon, George R. Hardman, Jr., successor to Ephraim Lambert.

THE COURT: Are you familiar with those matters, Judge Hatch, so you can say?

MR. HATCH: I know the names. I think I recollect the award to Lambert in the Fulton decree about that quantity of land. I would not offer any objection to it.

THE COURT: Does any of the counsel offer any objection to this application to be made parties and to be awarded the water, as shown under the Fulton decree for all of them for the quantities stated?

MR. HATCH: Parties to whom they are successors. They are all successors to somebody.

THE COURT: These parties may be made parties defendant, and permitted at this time to file their pleading.

MR. SOULE: Your honor please, the pleading has been considered amended, and we will offer as the evidence on behalf of these people--if counsel will stipulate it may be allowed instead of calling witnesses-- the amounts as set out in the amendment. It has been figured out by Mr. Wentz on the same basis the other water rights are figured.

MR. HATCH: That was the stipulation.

THE COURT: I understood it should be an adjudication of that.

MR. SOULE: I wish to add to the motion the right of John T. Moon. I will write that in the motion as it is there, giving him his one acre. I have the three names in

the motion you have.

Now, I have one other matter. That is the first paragraph of my motion with reference to the storage rights of the Washington Irrigation Company. An error has occurred there. At the time the pleading was drawn, I was advised by my client we had an application in 1909 for 500 acre feet of water for the Washington Irrigation Company and pled that right. When we came to court here they produced two applications and I offered them both in evidence. One was withdrawn and Mr. Thomas submitted evidence on that later. The decree as drawn awards what we asked in our pleading, 500 acre feet to be completed along with other reservoir applications. Here is the second application I offered, and there is Mr. Davis' mark admitting it in evidence. It was then withdrawn for a copy to be substituted. The proof came in-- I have the evidence here-- Mr. Taylor testified -- "What is the area of this reservoir in acres?" "The area is 4567 acres." "What is the acre feet capacity?" "Capacity in acre feet 871.1." And the evidence showed it had filled to that capacity and that amount of water used.

THE COURT: I think I am familiar with the evidence. I remember distinctly, because you presented a brief whether you were entitled to that 371 and a fraction acre feet, not having--

MR. SOULE: It in the pleadings.

THE COURT: No, not on that question, but the fact you had put it to a beneficial use. You were proceeding on the theory you had pled all your applications, and it was determined not upon the question presented in your brief, but for the reason you had only pled 500 feet.

MR. SOULE: I consider there was a stipulation here pleadings might be amended to conform to the proof. When I

come to check up this decree a few days ago, much to my surprise, my clients produced two licenses, one for 500 acre feet, 2812, which the court has allowed, and another license for application 2813, for the 371.1 feet. I then went to the State Engineer's Office to find out the fact for myself, and I found there this company had on the same day in 1909 made two applications to appropriate water, each for 500 acre feet, and they had been advising me their application was 500. Now, the State Engineer has proceeded to award them all under the one 500 feet, and give them a license on the other of 371.1 acre feet. I did not know until last week they had two applications. In fact it was their understanding they had one, and I have asked the pleading be amended that I might plead this second application.

THE COURT: Any objection to this pleading being amended to conform to the proof?

MR. HATCH: We have none.

THE COURT: This motion may be allowed and pleading may be amended.

MR. SOULE: Then may I offer in evidence in the case the two licenses?

THE COURT: No, I do not think we can take any evidence. Your evidence is complete as to your right under those applications at that time to 871 acre feet, and the right to proceed.

MR. SOULE: Then the findings and decree may be amended. That is all. Thank you.

THE COURT: Next matter is Chase Hatch.

MR. CHASE HATCH: We ask that motion be stricken from the files. At the time it was thought to be agreeable with the water users, but it is not and it will require evidence to decide that.